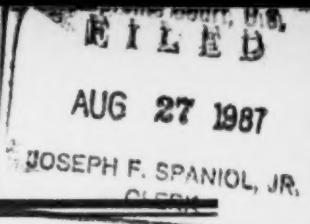


No. 87-39



In the Supreme Court of the United States
OCTOBER TERM, 1987

JAY E. GREGORY, SHERIFF OF PATRICK COUNTY, VIRGINIA,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

JESSICA DUNSMAY SILVER
MIRIAM R. EISENSTEIN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

11PPW

QUESTION PRESENTED

Whether the road deputies to the Sheriff of Patrick County, Virginia, are "personal staff" within the meaning of 42 U.S.C. 2000e(f) and thus outside the protections of Title VII of the Civil Rights Act of 1964.



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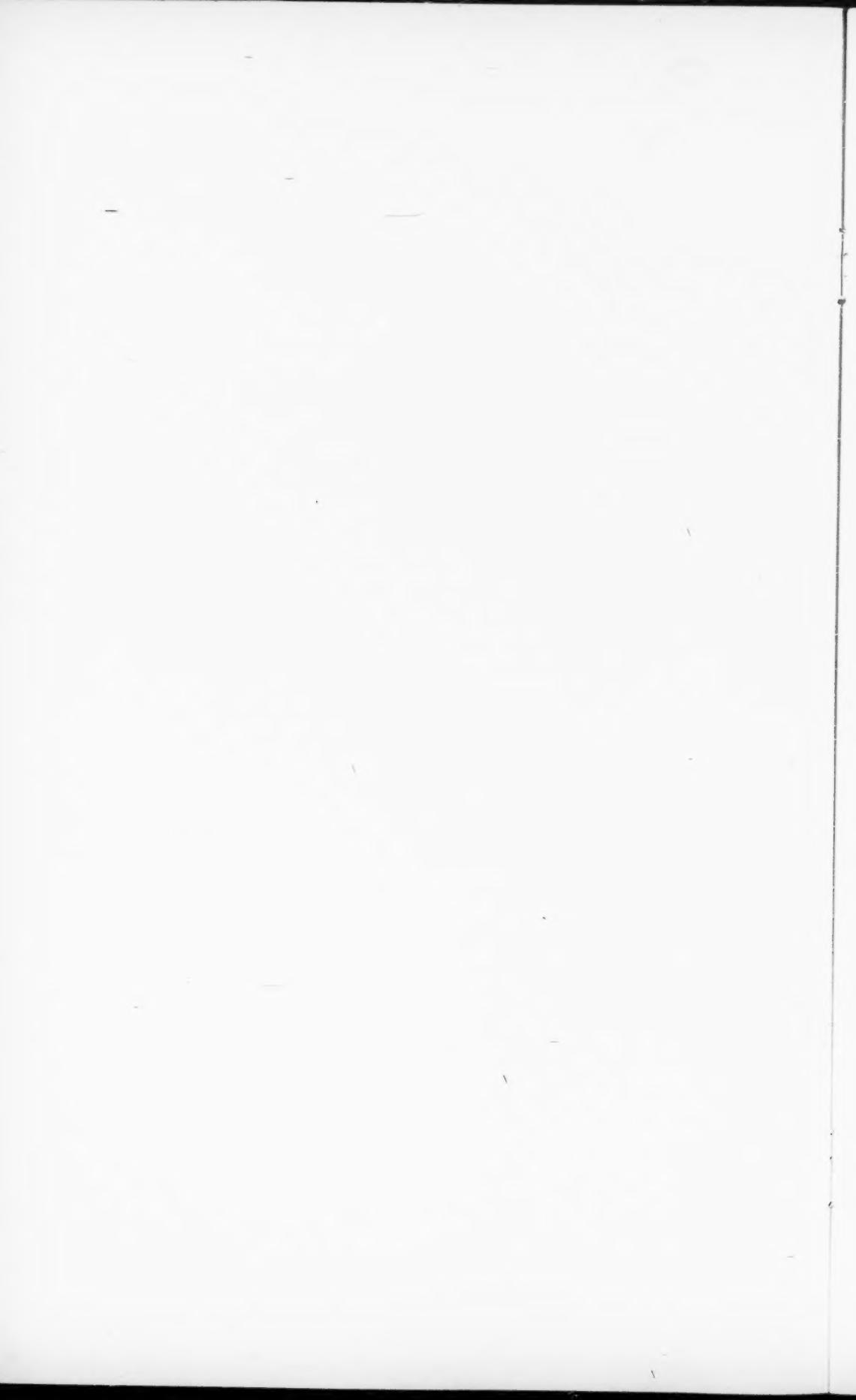
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OPINION BELOW

The opinion of the court of appeals (Pet. App. C1-C23) is reported at 818 F.2d 1114. A prior opinion of the court of appeals (Pet. App. A1-A7) is unreported. The opinion of the district court (Pet. App. B3-B27) is unreported. A prior opinion of the district court is reported at 582 F. Supp. 1319.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1987. The petition for a writ of certiorari was filed on July 6, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Patrick County is a sparsely populated, rural county consisting of approximately 469 square miles in southwest Virginia (Pet. App. C4; 582 F. Supp. at 1320). Pursuant to Virginia statute, the Sheriff of Patrick County

is elected by the citizens of the county to serve a four-year term (*ibid.*). The Sheriff employs 22 individuals, eighteen of whom are "sworn officers" or deputies (Pet. App. B12-B13, C4; 582 F. Supp. at 1320). The Sheriff certifies the job title and duties of each of his employees to the Virginia Compensation Board, which determines the number and salaries of full-time employees that the Commonwealth will fund for the Sheriff (*id.* at 1321).¹ Under Virginia law, the actual selection of deputies is within the discretion of the Sheriff (subject to minimum state standards);² the deputies' terms of employment are co-extensive with the Sheriff's term in office and, during that period, they serve at his will (Pet. App. B6-B7; 582 F. Supp. at 1320-1321).³

Among the "sworn officers" or deputies employed by the Sheriff are four so-called "road deputies" (Pet. App. C4; 582 F. Supp. at 1320).⁴ According to the district

¹ While the Sheriff retains discretion to hire additional employees and to pay them with local funds, he thus far has not chosen to do so (C.A. App. 24-25, 134-135).

² Under Virginia law, a deputy sheriff must be a United States citizen, have a high school diploma or its equivalent, have a driver's license, pass a physical examination, and successfully complete a training course within one year of hire (582 F. Supp. at 1320-1321). Individual sheriffs may add to these requirements (*id.* at 1321). Petitioner's predecessor in office, Sheriff Williams, required applicants to pass a written test and considered the test score as one of a number of factors in determining whom to hire (C.A. App. 78, 80-81). In addition, he subjected all potential deputies to a background investigation (C.A. App. 111-119). During the period between petitioner's assumption of office on January 1, 1984, and the time of his testimony in this case, petitioner required only that applicants satisfy the minimum state employment standards (C.A. App. 277-278).

³ While Virginia law provides that a deputy's term technically ends with that of the Sheriff's term in office, recent sheriffs of Patrick County have not replaced their predecessors' deputies on a wholesale basis (C.A. App. 67, 71, 139-145).

⁴ Also employed as deputies were "two investigators, two super-

court, these road deputies patrol the county, respond to calls by the public for assistance, enforce the traffic laws, make arrests, and transport prisoners to and from court, jail, and prison (Pet. App. B13-B14; 582 F. Supp. at 1321-1322, 1325). The road deputies report to their shift supervisors; they report to the sheriff only if their supervisor is not available (C.A. App. 22-23, 128-129). No woman has ever held a road deputy position (Pet. App. A4).

2. The United States initiated this action on June 29, 1983, alleging, among other things, that the Sheriff of Patrick County has discriminated on the basis of sex against applicants for the road deputy positions in violation of 42 U.S.C. 2000e *et seq.* (Pet. 4; Pet. App. A2, B3, C5-C6). After a three-day trial, the district court directed a verdict for the Sheriff, holding that the positions from which females allegedly have been excluded are part of the Sheriff's "personal staff" within the meaning of 42 U.S.C. 2000e(f) and thus are not protected by Title VII (582 F. Supp. at 1325). While the appeal of this decision was pending, the Fourth Circuit addressed the meaning of the "personal staff" exemption and concluded that it was not applicable to deputy sheriffs in a county in North Carolina. See *Curl v. Reavis*, 740 F.2d 1323 (1984). Accordingly, the instant action was remanded for reconsideration by the district court in light of the Fourth Circuit's recent decision (Pet. App. A1-A7).

On remand, the district court again concluded that the road deputy positions fit within Title VII's "personal staff" exemption (Pet. App. B3-B27). It first noted that, according to the Fourth Circuit's decision in *Curl*, the "plaintiff's status as an employee under Title VII [is] a question of

visors, two court security officers, five correctional officers, one process server, and two 'clerk-steno' matrons" (Pet. App. C4).

federal law" and that "state law [is] relevant [only] in defining and describing the plaintiff's position, her duties, and the way she was hired, supervised, and fired" (*id.* at B7-B8). It then noted that "the determination of whether a position on the sheriff's staff falls within the personal staff exemption must be made on a case-by-case basis" and must involve an analysis of "both the legal relationship and the actual (factual) relationship of the sheriff to the particular position and person who occupies it" (*id.* at B11). Finally, it held that "the four road deputies fall within the personal staff exemption," noting that "[i]t is the road deputy who is the alter-ego and personification of the sheriff in the geographical area to which he is assigned," and that the road deputies "are the eyes and ears of the sheriff, not only for matters which fall within their official sphere[,] but also as to matters political" (*id.* at B13-B14).⁵

3. The court of appeals reversed (Pet. App. C1-C23). It first noted that "Title VII defines the term 'employee' as: 'an individual employed by an employer, except that the term 'employee' shall not include any person elected to public office * * * or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect

⁵ Since "the job of supervisor and investigator * * * require prior experience as a road deputy," the district court held that these positions are also within the "personal staff" exemption (Pet. App. B14). By contrast, it held that the positions of correctional officer and courtroom deputy are not within the "personal staff" exemption, though it found that being male is a "bona fide occupational qualification" for the correctional officer position (*id.* at B14-B17, B19-B20). Finally, it found that there had been no *prima facie* showing of discrimination made with respect to the position of process server (*id.* at B17-B18).

to the exercise of the constitutional or legal powers of the office * * * " (*id.* at C10, quoting 42 U.S.C. 2000e(f)). It further noted that, in *Curl*, it had said that the question whether a position fits within the "personal staff" exemption is "one of federal law, with state law relevant only insofar as it describes the plaintiff's position, including his duties and the manner in which he is hired, supervised, and fired" (Pet. App. C11). It then reviewed the factors that it had considered in *Curl*, including the intimate or sensitive nature of the position and whether or not it is under the personal direction of the elected official (*id.* at C12). Finally, "[b]ased on [its] examination of the multiple features of the relationship between the sheriff of Patrick County and his deputies," the court concluded that it could not "say as a matter of law that the deputy positions fall[] within the personal staff exception to the coverage of Title VII" (*id.* at C14).

The court stressed (Pet. App. C14-C15) that "[t]he road deputies in Patrick County function primarily as typical policemen who administer the laws and the 'policies' of their superiors," that "[t]here is no evidence that the road deputies are called upon to render advice to the sheriff respecting his policy decisions or the proper exercise of his powers," and that "[t]he road deputy position in Patrick County is not one high within the chain of command, nor do these road deputies occupy a highly intimate and sensitive status vis-a-vis the sheriff." While the court supposed that it "could assume that, with a small deputy contingent, the relationship between the deputies and the sheriff might be close," it nevertheless concluded that the Sheriff "simply failed to show that the closeness has engendered a highly intimate relationship which influences the making of policy" (*id.* at C15). Thus, it remanded the case for further proceedings on the merits of the Title VII claims (*id.* at C15-C16).⁶

⁶ Because the individual-plaintiffs "only applied for the position of road deputy, and because they could not have applied for the posi-

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioner first contends (Pet. 11-16) that there is "conflict and confusion among the circuits" concerning whether the scope of the "personal staff" exemption is a question of federal or state law. But, like both the district court and the court below (see Pet. App. B7-B8, C11), the courts of appeals uniformly have held that the determination whether an individual is a member of an elected official's "personal staff," within the meaning of 42 U.S.C. 2000e(f), is a question of federal law. See, e.g., *Teneyuca v. Bexar County*, 767 F.2d 148, 150 (5th Cir. 1985); *Owens v. Rush*, 654 F.2d 1370, 1375 (10th Cir. 1981); cf. *EEOC v. Reno*, 758 F.2d 581, 584 (11th Cir. 1985) (construing "personal staff" exemption in Age Discrimination in Employment Act). These courts have said that "[s]tate law is relevant [only] insofar as it describes the plaintiff's position, including his duties and the way he is hired, supervised, and fired" (*Calderon v. Martin County*, 639 F.2d 271, 273 (5th Cir. 1981). Accord, *Owens v. Rush*, 654 F.2d at 1375; *Curl v. Reavis*, 740 F.2d at 1327; *EEOC v. Reno*, 758 F.2d at 584. The cases that petitioner cites (Pet. 12-15) are not to the contrary.⁷ Thus, there is no "conflict" or "confusion" among the courts to clear up.

tions of supervisor and investigator," the court declined "to decide whether the positions of investigator and supervisor fall within the personal staff exception to Title VII" (Pet. App. C16 n.3). It did, however, reverse the district court's determination that being male is a "bona fide occupational qualification" for the correctional officer position (*id.* at C16-C18).

⁷ In *Ramirez v. San Mateo County*, 639 F.2d 509, 513, (9th Cir. 1981), the court held that a deputy district attorney's high place in the

2. Petitioner similarly errs in suggesting (Pet. 16-19) that the court below limited the "personal staff" exemption to those deputies who *both* enjoy an intimate relationship with the Sheriff and influence his policies. The court below imposed no such rigid limitations on the "personal staff" exemption's applicability. To be sure, in assessing whether the "personal staff" exemption applied in this case, the court examined the intimacy of the relationship between the Sheriff and his deputies and the influence that those deputies have had on the Sheriff's policies. See Pet. App. C14-C16. But the court did not suggest that affirmative findings with respect to both of these factors are necessary conditions of a "personal staff" relationship. Rather, these were just two of the "multiple features of the relationship between the sheriff of Patrick County and his

chain of command and sensitive and intimate relationship with the district attorney rendered that deputy district attorney part of the "personal staff" of the district attorney and outside of the protection of Title VII; nothing in the opinion in the case suggests that the applicability of the "personal staff" exemption turns on any particular question of state law. The same statement is true of the opinions in *Wall v. Coleman*, 393 F. Supp. 826, 827-831 (S.D. Ga. 1975) (assistant district attorney who served at district attorney's pleasure, who performed the same duties as district attorney, and who had intimate relationship with district attorney fit, within the "personal staff" exemption), and *Gearhart v. Oregon*, 410 F. Supp. 597, 598-601 (D. Or. 1976) (nature of deputy legislative counsel's duties and her relationship with elected officials rendered legislative counsel an "immediate advisor" within meaning of 42 U.S.C. 2000e(f)). Finally, while the opinion in *Kyles v. Calcasieu Parish Sheriff's Dep't*, 395 F. Supp. 1307, 1310 (W.D. La. 1975), suggests that state law may in some instances determine whether the "personal staff" exemption applies, that opinion has clearly been superseded by appellate decisions of the Fifth Circuit holding that the applicability of the "personal staff" exemption is a question of federal law. See, e.g., *Clark v. Tarrant County*, 798 F.2d 736, 742 (1986); *Teneyuca v. Bexar County*, 767 F.2d at 150; *Calderon v. Martin County*, 639 F.2d at 272-273.

deputies" that the court examined in order to determine whether any of the indicia of "personal staff" are applicable to the road deputies of Patrick County. Its discussion of those relevant indicia (*id.* at C14-C15) makes clear that none of them are present.⁸

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

JESSICA DUNSMAY SILVER
MIRIAM R. EISENSTEIN
Attorneys

AUGUST 1987

⁸ The other courts of appeals analyze the "personal staff" question using similar criteria. See, e.g., *Teneyuca v. Bexar County*, 767 F.2d at 150-153; *Owens v. Rush*, 654 F.2d at 1375-1377; *Ramirez v. San Mateo County*, 639 F.2d at 511-513.